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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAVID H. LUCAS

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAVID H. LUCAS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner David H. Lucas. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit corporation organized under the laws of the State of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation as amicus curiae in this matter.

It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues presented in the case at bar. PLF has participated in numerous cases involving the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

PLF participated in the present case as amicus curiae in support of petitioner before the South Carolina Supreme Court and filed a brief with this Court in support of the petition for writ of certiorari.

The opinion below holds that a regulation characterized by the court as enacted to prevent "serious public harm" is immune to challenge under the Takings Clause of the United States Constitution, even though it deprives a citizen of all economically viable use of his property.

This holding directly conflicts with well-established precedent of this Court which teaches that a regulatory taking occurs whenever a property regulation deprives owners of economically viable use of their property. By erroneously positing a broad "public harm" exception to the Takings Clause, the South Carolina Supreme Court has deprived petitioner of fundamental rights guaranteed by the United States Constitution.

STATEMENT OF THE CASE

David H. Lucas is the owner of two undeveloped oceanfront lots in Charleston County, South Carolina, which he purchased on December 3, 1986, for $975,000. On July 1, 1988, the South Carolina General Assembly adopted the Beachfront Management Act which regulated development along the South Carolina coastline by imposing statutorily mandated setback lines. The Beachfront Management Act is administered by respondent South Carolina Coastal Council.

The Act's setback line precluded petitioner from building a residence or making any other economically reasonable use of his property. Since the two lots are located seaward of the setback line, the Act required them to remain forever undeveloped.

Petitioner filed an action in the South Carolina Court of Common Pleas asserting that the Act's restrictions on the use of his lots amounted to a taking of his private property for public use without just compensation. The court agreed and awarded petitioner compensation for

the regulatory taking. In reaching this conclusion, the court made the following finding of fact:

> "I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." Order of the Court of Common Pleas at 5.

On appeal the South Carolina Supreme Court reversed, although it did not dispute the factual finding that the Beachfront Management Act effectively deprives petitioner of all economically viable use of his property. Instead, the reversal was based on the court's assertion that the Takings Clause never requires compensation when a regulation is enacted to prevent a serious public harm. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899-900 (S.C. 1991). This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional rights.

SUMMARY OF ARGUMENT

The holding of the court below, that the Beachfront Management Act has not taken petitioner's property without just compensation, directly conflicts with this Court's regulatory takings doctrine.

In 1922, this Court held that government regulation can be challenged as a taking under the Takings Clause of the Fifth Amendment to the United States Constitution.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Writing for the majority, Justice Holmes said:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Justice Holmes, while referring to the Fifth Amendment's Takings Clause as an "absolute protection," nevertheless recognized that it was qualified by "the police power." *Id.*

But given this qualification, Justice Holmes also observed that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

This description embraces precisely what has occurred in the instant case. And, as Justice Holmes stated, such a result "cannot be accomplished in this way under the Constitution of the United States." *Id.*

Although this Court has in more current times referred to Justice Holmes' analysis as "established doctrine" (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 316), this Court has also recognized that the question of what constitutes a regulatory taking "has proved to be a problem of considerable difficulty." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978).

What has always been clear, however, is that the takings issue is to be considered in light of the guiding principle that the Fifth Amendment's Takings Clause "was designed to bar Government from forcing some

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

In *First Church*, this Court referred to this principle as "axiomatic." 482 U.S. at 318. And in applying this principle, it has long been recognized that "the question at bottom is upon whom the loss of the changes desired should fall." *Pennsylvania Coal*, 260 U.S. at 416.

In *Penn Central*, the Court said that it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124.

The Court, in *Penn Central*, nevertheless "identified several factors that have particular significance." *Id.* The Court referred to:

1. "the character of the governmental action,"
2. the "economic impact of the regulation," and
3. "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

These factors have never been held to be exclusive. They are merely means for analyzing the question of whether, in a given factual situation, the regulation goes too far. In other words, such factors assist in determining whether the regulation in reality is an attempt to load "upon one individual more than his just share of the burdens of government." *See Keystone Bituminous Coal*

Association v. DeBenedictis, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (citing *Monongahela Navigation Company v. United States*, 148 U.S. 312, 325 (1893)).

As stated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980):

> "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

From the generalized considerations spelled out in *Penn Central*, where the facts are suffiently extreme, however, two bright-line tests have evolved which weigh so heavily in favor of a takings conclusion that when either one occurs, it can fairly be said that the regulation goes "too far" and that "fairness and justice" require the finding of a taking.

The first is where the character of the governmental action is such that it fails to substantially advance a legitimate state interest. *Nollan v. California Coastal Commission* is an example of this bright-line test and a taking was found despite the fact the property owner was left with reasonable use of the property—a conclusion relied on earlier by the California court below. *See Nollan*, 483 U.S. at 830.

The second bright-line test recognizes a taking wherever the economic impact of the government regulation is so severe as to deny an owner economically viable use of the property. *Hodel v. Irving*, 481 U.S. 704, illustrates this

test. There the regulation amounted to "virtually the abrogation of the right to pass on a certain type of property." *Id.* at 716.

In *Agins*, this Court made it clear that either finding alone would result in a taking. The Court summarized the rule as follows:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260.

In *Keystone*, 480 U.S. at 485, this Court, quoting *Agins*, referred to these two factors as having "become integral parts of our takings analysis."

Of course, it follows that even though a government regulation may survive these bright-line tests, this does not end the inquiry. The character of the government action is still relevant. So also is the regulation's economic impact on the property. And this Court has given particular attention to interference with reasonable investment-backed expectations. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). But, given the foregoing evolution of this Court's takings analysis, it is helpful, as a practical matter, to approach an individual case initially with the bright-line tests for if the regulation does not survive them, the answer is at hand.

In the present situation, it is clear that the regulation does not survive the second test.

The court below relies on a broad "public harms" exception to the Takings Clause stemming from the 19th

Century due process case, *Mugler v. Kansas*, 123 U.S. 623 (1887). However, *Mugler* and its progeny cannot support this interpretation for two reasons. First, *Mugler* was decided 30 years before this Court first recognized the possibility of regulatory takings. Second, neither *Mugler* nor any other decision of this Court upholds the validity of a regulation that—like the Beachfront Management Act—deprives an owner of all economically viable use of his property. And if, despite its prior holdings, this Court should adopt some kind of a "nuisance" exception which allows government to deprive an owner of economically viable use of property, it is inconceivable that the construction of a private residence on a citizen's own land could be characterized as a nuisance or nuisance-like activity.

Finally, even if this Court were to find that the regulation survived the bright-line tests, it would still not survive scrutiny under the more general considerations which have been looked to by this Court. There has been an obvious frustration of investment-backed expectations. And the character of the government action weighs heavily in favor of a taking conclusion as was found by the dissenting justices in the South Carolina Supreme Court.

ARGUMENT

I

THE COURT BELOW FUNDAMENTALLY MISCONSTRUED THIS COURT'S REGULATORY TAKINGS DOCTRINE

A. This Court Has Established Two "Bright-Line" Tests for Regulatory Takings

This Court has recognized that, absent compensation, land use regulations will effect an unconstitutional taking if they fail to "substantially advance legitimate state interests," *or* if they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. at 260. These criteria are stated in the disjunctive; either is sufficient to establish a regulatory taking without further analysis. Accordingly, this two-part inquiry can be viewed as a "bright-line" threshold test that land use regulations must clear as a first step in determining whether they violate the Takings Clause.

Both elements of this two-pronged test must be resolved in the government's favor before a reviewing court need further analyze the challenged regulation. *See* Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988). *See also Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (referring to two-prong "threshold test" in regulatory takings analysis). If *either* prong of the test is decided in favor of the property owner, the measure will be found to constitute a regulatory taking. *See, e.g.*, Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 Hastings L.J. 359, 362 (1988).

It is helpful to trace the gradual evolution of the two-pronged threshold test over the 70 years since this Court first recognized that otherwise legitimate police-power regulations can so attenuate the rights of property owners as to effect a taking under the Fifth Amendment. Its roots can be found in the seminal 1922 regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393.

In *Pennsylvania Coal*, Justice Holmes struggled to identify the relevant factors that determine when a regulation "goes too far" and must be recognized as a taking. *Id.* at 415. On the one hand, Holmes was concerned with the "extent" or "sufficiency" of the governmental interest advanced. *Id.* at 413-14. Justice Holmes clearly recognized, however, that a legitimate police-power rationale could not in itself insulate a regulation from challenge under the Takings Clause.

The Pennsylvania Supreme Court had upheld the Kohler Act on precisely the same grounds that the South Carolina Supreme Court relies upon in the case at bar: "that the statute was a legitimate exercise of the police power." *Id.* at 412. Holmes perceived, however, that if the "seemingly absolute" protections of the Takings Clause could be overridden by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415.

In other words, *Pennsylvania Coal* established that finding a regulation to be a legitimate exercise of the police power is a *necessary but not sufficient condition* to pass constitutional muster under the Takings Clause. Beyond the requirement of police power legitimacy, this

Court added a second test: the "extent of the diminution" of the victim's property interest. *Id.* at 413. Since the Kohler Act made it "commercially impracticable" to mine certain coal deposits, the regulation was found to violate the Takings Clause *despite* its rationale as a public health and safety measure. *Id.*

The two inquiries highlighted in *Pennsylvania Coal*—the character of the governmental interest and the diminution of private property rights—have gained increasing significance under this Court's regulatory takings doctrine and have acquired sharper focus and force over time.

More than 50 years after *Pennsylvania Coal*, this Court again examined its regulatory takings doctrine in *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104. Writing for the Court, Justice Brennan acknowledged that regulatory takings law remained an area of "ad hoc factual inquiries." *Id.* at 124. However, two of the factors singled out as especially relevant were the "character of the governmental action" and the "economic impact of the regulation" on the claimant. *Id.*

Penn Central's inquiry into the "character" of a challenged regulation was the direct linear descendant of Justice Holmes' concern with the "sufficiency" or "extent" of the governmental interest in *Pennsylvania Coal*. Pursuant to this inquiry, the *Penn Central* Court found that New York's landmark regulation fell within the city's police power, serving to promote the public "health, safety, morals or general welfare." *Id.* at 125. Significantly, however, the inquiry did not stop there.

Having satisfied itself that New York's landmark regulation was a legitimate exercise of the police power, this Court then turned to the second issue, the economic impact of the regulation on petitioner's property. *Penn Central*'s regulatory takings claim was rejected *only* after the Court determined that the owner could continue to make profitable use of the regulated property. *Id.* at 135-38.

In 1980, the language of the regulatory takings test took a more succinct form. The *legitimacy* prong now requires suspect regulations to "substantially advance legitimate state interests;" while the *economic impact* prong examines whether they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. at 260. This Court's most recent refinement of these standards was provided in *Nollan v. California Coastal Commission*, a landmark regulatory takings case which is completely ignored by the court below. *Nollan* sharpened the legitimacy prong of the two-part test to include an inquiry into whether the regulated use of property is responsible for causing the harm which the regulation addresses. *Nollan*, 483 U.S. at 834-37. Even more significantly, *Nollan* expressly requires courts to apply a *heightened level of scrutiny* in examining the purpose and impact of suspect regulations. *Id.* at 834 n.3.

Over the past decade the two-fold legitimacy/impact inquiry has taken on the sharpness and prominence typically associated with a "bright-line" threshold test. In keeping with this development, this Court has struck down measures violating *either* prong of the two-part test without further inquiry. The *Nollan* decision clearly illustrated that when a regulation fails to substantially

advance a legitimate government interest a taking occurs regardless of the economic impact on the property owner. Conversely, this Court has also made it clear that regulations which deprive an owner of economically viable use of property violate the Takings Clause regardless of the merits of the state interests they may advance. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984).

The emergence of the bright-line legitimacy/impact threshold test does not mean that other considerations have no place in modern regulatory takings analysis. If a regulation *violates* either prong of the threshold test, compensation is always required under the Takings Clause. However, if the challenged measure *survives* the legitimacy/impact inquiry, it is then subjected to an equitable weighing of more general considerations to determine "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." *Penn Central*, 438 U.S. at 124. Among the factual issues that may enter this equitable weighing are the regulation's interference with distinct investment-backed expectations and the extent to which a particular owner is singled out to bear the full costs of what should rightfully be a general public burden.

The crucial point is that this generalized equitable analysis need only come into play, if at all, *after* it is determined that the challenged measure survives the bright-line tests. If a challenged regulation fails to substantially advance a legitimate interest *or* deprives an owner of economically viable use of property, that measure violates the Takings Clause without regard to any

other factors and without recourse to "balancing" or "exceptions."

B. South Carolina's Beachfront Management Act Clearly Violates at Least One of This Court's Threshold Tests for Regulatory Takings

The most obvious infirmity of the Beachfront Management Act is its failure to clear the second prong of this Court's threshold test for regulatory takings. The trial court in the present action made a specific factual determination that the setback lines deprived Lucas of "any reasonable economic use of the lots," and rendered the lots "valueless."

This factual determination is completely dispositive of the question at issue. This Court's modern jurisprudence of regulatory takings is unambiguous. A taking occurs "if the ordinance . . . denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. at 295-96 ("[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of land' ") (quoting *Agins v. Tiburon*, 447 U.S. at 260).

This second prong of the threshold takings inquiry does not refer to a "balancing" of public and private interests. Indeed, it rests on an implied *presumption* that the challenged legislation falls within the legitimate authority of the state and thereby advances some public benefit, perhaps of great magnitude. The nature of the state's action is a critical inquiry only in connection with

the question of whether the first prong of the regulatory takings test has been satisfied. A finding of legitimacy satisfies the two-part threshold test *only* when coupled with a finding of no deprivation of economically viable use. If there has been such a deprivation, a taking has occurred on that ground alone regardless of the nature of the state's action.

The issue under this prong of regulatory takings doctrine is not whether a regulation's benefits are legitimate, or even whether they are worth the costs, but whether these benefits have been acquired by stripping away individual property rights protected by the Constitution. Since *Pennsylvania Coal* such means are never acceptable, regardless of the ends to be achieved.

C. This Court Has Never Recognized a "Public Harm" Exception to the Takings Clause Broad Enough to Permit the Deprivation of All Economically Viable Use of Property Without Payment of Just Compensation

The court below erroneously holds that this Court's carefully structured tests for regulatory takings may be overridden "when the regulation exists to prevent serious public harm." *Lucas*, 404 S.E.2d at 899.

As Professor Michelman has pointed out, such a broad exception to the Takings Clause would be a logical absurdity, since in most cases it is only a matter of semantics whether regulations are characterized as preventing public harms or bestowing public benefits. Michelman, *Property, Utility, and Fairness: Comments on the Ethical*

Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196-1201 (1967). Moreover, nothing in this Court's modern regulatory takings doctrine supports such an exception. The contrary holding by the court below springs from a fundamental misconception of the historical evolution of regulatory takings law.

1. Meaningful Constitutional Interpretation Is Dependent on Historical Context

The evolution of complex constitutional doctrines seldom follows a simple linear path that can be traced with precision through the cases from the Founding down to the present day. The interpretation of key constitutional provisions typically goes through periods of flux as courts struggle to find the best "match" between the protections intended by the Founders and the social, economic, and political context in which disputes arise.

Professor Ackerman describes this process as one of *multigenerational synthesis*. Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 517 (1989). Meaningful interpretation must synthesize the text of the Federalist Constitution with shifts in the "constitutional status quo" marked by such historical watersheds as Reconstruction and the New Deal. *Id.* at 516-21.

A corollary of this problem is that the contemporary relevance of any decision is at least partly a function of the era in which it was generated. To ignore historical context and conflate legal doctrines from different eras and different stages of development is to invite interpretive incoherence.

The decision below is a paradigm example of this fallacy. By resorting to the 19th Century due process rule of *Mugler v. Kansas* to dispose of a modern regulatory takings issue, the court below arrives at a result consisting of equal parts historical absurdity and doctrinal muddle.[1]

2. Mugler and Its Progeny Employ an Outdated, Single-Pronged Due Process Test Wholly Inappropriate to Modern Regulatory Takings Claims

The basic recognition that private property can be taken by excessive regulation was slow to evolve in the courts. During the early development of American constitutional law "a purely physical conception of the process

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[1] The doctrinal muddle is also reflected by the Washington Supreme Court's decision in *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990). In that case, the Washington court ruled that a regulation which "safeguards the public interest in health, safety, the environment or the fiscal integrity of an area" is insulated from any takings analysis, provided the regulation does not destroy the right to possess, to exclude others, or to dispose of the property. *Id.* at 912. The *Presbytery of Seattle* analysis is inconsistent with this Court's taking jurisprudence and improperly limits regulatory takings to only a narrow band of government actions. The South Carolina Supreme Court in the case at bar cited *Presbytery of Seattle* in support of its "public harm" exception. *Lucas*, 404 S.E.2d at 902 n.7. This Court should reverse the decision of the South Carolina Supreme Court and, in so doing, express its disapproval of the analytical framework expressed in *Presbytery of Seattle*. *See generally* Comment, *Taking Issue with Takings: Has the Washington State Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991).

of condemnation was amply sufficient." Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221, 225 (1931). Early federal takings cases almost always dealt with physical encroachments—the outright seizure of property by government, or physical interference with the utility or accessibility of land. *See, e.g., Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1872) (flooding); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (smoke damage).

As government regulation of property grew more extensive and invasive, the Takings Clause began to take on relevance as a potential source of protection for property owners. However, the argument that property regulations might require compensation under the Fifth Amendment was simply not entertained by pre-20th Century courts.

This legal environment is the key to interpreting such decisions as *Mugler v. Kansas*. In *Mugler*, the State of Kansas passed legislation driving Peter Mugler out of what had been a perfectly lawful business, thereby destroying the value of his productive capital. The Supreme Court found the law constitutionally sound, since "the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks." *Mugler*, 123 U.S. at 662.

Taken out of historical context and measured by the regulatory takings doctrine of 100 years later, *Mugler* seems inexplicable. In its proper context, however, it is obvious that *Mugler* can have no relevance to regulatory takings law whatever. The case was appealed to the Supreme Court as a due process violation. (Indeed, the

Takings Clause had not yet been deemed "incorporated" into the Fourteenth Amendment for application to the states. *See Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897)). The operative language in *Mugler* is the standard due process analysis of the period. The *Mugler* Court was concerned with *only* the question of whether the regulation was a legitimate exercise of the state's police powers. The impact of the regulation on Peter Mugler's property was not considered since this issue was not relevant to a due process inquiry.

Having concluded that the Kansas ordinance was a valid exercise of the police power, the *Mugler* Court's review of the case was, for all intents and purposes, concluded. The economic impact prong of modern regulatory takings analysis was not applied for the self-evident reason that the doctrine of regulatory takings did not yet exist. For the same reason, *Mugler* cannot be coherently interpreted as an "exception" to the regulatory takings principles that Justice Holmes would first speak to in *Pennsylvania Coal* some 35 years later.

3. This Court Has Never Upheld a Regulation That Deprives an Owner of All Economically Viable Use of Property

Mugler v. Kansas cannot sensibly be interpreted as an exception to this Court's regulatory takings doctrine, since it was handed down during an era prior to the recognition that regulatory takings could occur at all. It is significant however that this Court has never upheld, even in *Mugler* and its progeny, the validity of a regulation that deprives an owner of all economically viable use

of property. Thus, even if the *Mugler*-era cases are thought to retain some vitality in the modern era, they could not possibly stand for the broad "nuisance" rationale embraced by the court below.

South Carolina's Beachfront Management Act was found to deprive petitioner of "any reasonable economic use" of his property, rendering it "valueless." Order of the Court of Common Pleas at 5. The roster of this Court's decisions reveals not a single case in which such a total nullification of property rights has been upheld against a takings challenge.

The court below cites five cases in support of its assertion of a broad "public harms" exception to the Takings Clause: *Mugler*, 123 U.S. 623; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470. However, even a superficial review of these cases reveals that not one of them involved the complete diminution of economically viable use of property.

In *Mugler*, the plaintiff did not contend, nor did the Court conclude, that no structures could be built on Mugler's property, or that the regulation permitted no economically viable use of the land.

In *Hadacheck*, a city ordinance prohibited the manufacture or burning of brick within described geographical limits. The Court was thus not presented with a deprivation of all economically viable use of property, because the plaintiff was free to construct residences or other types of manufacturing enterprises on the property.

In *Miller*, the State of Virginia ordered plaintiffs to cut down a large number of ornamental cedar trees to prevent the communication of a plant disease to apple orchards in the vicinity. Plaintiffs were, however, entitled to use the felled trees and to make any other economically viable use of their property.

In *Goldblatt*, a local ordinance regulated dredging and excavating on private property. The Court found no evidence "which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Goldblatt*, 369 U.S. at 594.

Finally, in *Keystone*, the State of Pennsylvania's Subsidence Act restricted mining practices associated with damage to residential and other structures. In concluding that the Act did not effect a taking of plaintiffs' property, this Court noted that plaintiffs had "failed to make a showing of diminution of value sufficient to satisfy the test set forth in Pennsylvania Coal and our other regulatory takings cases." *Keystone*, 480 U.S. at 492-93.

The schism between the *Keystone* majority and the dissent focused on this very point. Chief Justice Rehnquist argued that the property in question was the coal which the Subsidence Act prohibited plaintiffs from mining. *Id.* at 514 (Rehnquist, C.J., dissenting). Since the Act completely deprived plaintiffs of economically viable use of this coal, the Chief Justice regarded the Act as a taking despite its "public harm" or "nuisance" rationale: "[W]e have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." *Id.* at 513 (Rehnquist, C.J., dissenting). The *Keystone* majority found no

taking precisely because they adopted a broader view of the property rights at issue.

While none of the cases cited by the court below support its assertion of a broad "nuisance" exception to the Takings Clause, its reading of *Keystone* does the greatest violence to the record. By combining the *minority's* analysis of the economic impact of the Subsidence Act (complete deprivation of use) with the *majority's* conclusion (no taking), the South Carolina Supreme Court arrived at an interpretation of *Keystone* wholly at odds with the views actually set forth by any member of this Court.

4. The Historical Significance of Pennsylvania Coal

This Court's concern solely with the *validity* of challenged property regulations, without consideration of their economic impact, ended in 1922 with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393. As discussed above, *Pennsylvania Coal* ushered in a new era by recognizing that otherwise legitimate police-power regulations may violate the Takings Clause through their impact on private property rights. In takings jurisprudence, *Pennsylvania Coal* marked a shift in the constitutional status quo as pronounced as Reconstruction or the New Deal. *See* Ackerman, *supra*.

The court below places great significance on the unremarkable proposition that *Pennsylvania Coal* did not "overrule" *Mugler*. *Lucas*, 404 S.E.2d at 900-01 (*citing Keystone*, 480 U.S. at 490-91). Such a narrow reading completely misses the significance of the decision. The

Court's concern in *Pennsylvania Coal* was not to "overrule" the due process jurisprudence of a bygone era. Rather, the justices were engaged in the larger task of forging a new line of constitutional jurisprudence appropriate to the postindustrial world of the 20th Century. *Pennsylvania Coal* is a masterful synthesis through which the original protections of the Takings Clause are made relevant to the modern social-political context of intensive and often predatory regulation.

The general principle laid down by *Pennsylvania Coal* was that courts must consider the economic impact of regulation, as well as its validity, in determining whether a taking has occurred. *Pennsylvania Coal*, 260 U.S. at 413. Justice Holmes realized that the transition to this principle would not occur as a clean, sharp break with the past. He recognized the difficulty of applying the new approach to exceptional emergencies "like the blowing up of a house to stop a conflagration." *Id.* at 415. (*Miller v. Schoene* is a prime example of such an emergency rationale—a decision standing at least as much "upon tradition as upon principle." *Pennsylvania Coal*, 260 U.S. at 416.) Nevertheless, the general direction of regulatory takings doctrine was clear.

The plain historical significance of *Pennsylvania Coal* is that the Court turned its back on the single-focused, 19th Century due process inquiry of *Mugler* and its progeny and embraced a new paradigm for the modern era. The modern takings analysis has been refined and sharpened over the past 70 years but it is unthinkable that this Court could now retrace its steps and return—like the court below—to the outmoded jurisprudence of a previous age.

II

EVEN IF THIS COURT WISHES TO ESTABLISH A NOXIOUS USE EXCEPTION TO THE TAKINGS CLAUSE, THIS EXCEPTION COULD NOT REASONABLY BE HELD TO ENCOMPASS PETITIONER'S CONSTRUCTION OF A PERSONAL RESIDENCE ON HIS OWN LAND

Even if this Court opts for the creation of a "noxious use" or "nuisance" exception, the facts of the case at bar cannot be easily brought within such an exception.

A nuisance occurs when the use of property has noxious impacts on neighboring landowners. In the present case, petitioner has been prohibited from building a house on his own land. Any "noxious effect" of this activity, including erosion and storm damage, could easily be restricted to petitioner's own property with *no* impact on the property of adjoining landowners.

The Beachfront Management Act, quoted extensively in the opinion below, primarily addresses the need to protect the South Carolina coastline from erosion. It does not, and cannot, portray the construction of a private residence as a "noxious" use of property on a par with the maintenance of an urban brickyard or gravel quarry. As was recently observed by the dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991):

> "The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as 'tantamount to a public nuisance.' . . . [T]he Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the . . . residences

are not dire threats to public safety and welfare." *Id.* at 173 n.2.

Given this reality, the Beachfront Management Act's conclusory references to the protection of "life and liberty" appear to be mere verbiage. Such boilerplate declarations cannot survive the close scrutiny required by this Court in *Nollan*.

The right of an individual to build a private residence on his own land is a fundamental attribute of liberty, grounded in natural law and transcending the existence of the state. As this Court recognized in *Nollan*, this fundamental right "cannot remotely be described as a 'governmental benefit.' " *Nollan*, 483 U.S. at 833 n.2. Still less can it be legislatively redefined as a noxious use, in order to evade the clear requirements of the Takings Clause.

CONCLUSION

In an era of increasingly complex and pervasive environmental regulations, this Court should reaffirm the preeminence of the United States Constitution. As laudable as the objectives of the Beachfront Management Act may purport to be, it must still be recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416.

For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

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Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation